Diese Website verwendet Cookies von Google, um Dienste anzubieten und den Traffic zu analysieren. Deine IP-Adresse und dein User-Agent werden zusammen mit Messwerten zur Leistung und Sicherheit für Google freigegeben. So können Nutzungsstatistiken generiert, Missbrauchsfälle erkannt und behoben und die Qualität des Dienstes gewährleistet werden.

WEITERE INFORMATIONEN OK

Wednesday, June 14, 2006

Global warming, fractal delegation, and the non-delegation doctrine

The non-delegation doctrine is often believed by legal professionals to have been invented by the U.S. Supreme Court in some time in the late nineteenth century. Furthermore, the popular theory goes, the non-delegation doctrine was only enforced by the Court very briefly in a failed attempt to stop the New Deal which broadly delegated economic lawmaking authority to executive and "independent" agencies.

In fact, the non-delegation doctrine was well understood by the Founders and extensively debated in early Congresses. Proponents of the non-delegation doctrine observed that Article I put "[a]ll legislative powers herein granted" in the hands of Congress, and thus none of it in the executive branch. Thus, they argued, all important rules should be made by the people's representatives rather than by poorly accountable executive branch employees. James Madison in particular was a proponent of a very strong (by modern standards) version of the non-delegation doctrine. Madison and his colleagues used the doctrine to argue that several Congressional proposals were unconstitutional and thereby defeat the measures in Congress.

In the Post Office debate I have chronicled, Madison argued that Congress could not delegate to the United States Post Office the ability to define main post office locations and the broadly stated origins and destinations of the major post roads. He admitted, however, that at some level of detail Congress could constitutionally give discretion to the Post Office to define particular local routes. How far up, in the fractal structure of postal routes, the Post Office could constitutionally be delegated such discretion remained unclear. The outcome of this particular debate was that broad grants of power to generally define offices and routes were unconstitutional, but legislation defining the broad interstate and intrastate routes between major towns and cities, and leaving further detail to the Post Office, was fine.

The non-delegation doctrine has remained a slippery doctrine ever since, and since the New Deal has fallen into disuse. We thus now have very broad enabling legislation such as that of the Environment Protection Agency, which grants the agency broad lawmaking authority over "pollutants," including the authority to make rules regarding "any air pollutant from any class or classes of new motor vehicle...[which] may reasonably be anticipated to endanger the public welfare."

Thus, argue the plaintiff states and environmental groups in *Massachusetts v. EPA*, the EPA has the authority to regulate carbon dioxide levels, even though carbon dioxide is not particularly mentioned in the legislation: given the scientific evidence that carbon dioxide causes global warming, carbon dioxide is clearly a "pollutant" that "may reasonably be anticipated to endanger the public welfare." They go on to argue that the EPA further has the legal duty under this legislation to regulate carbon dioxide levels. Even though the Bush Administration has decided that the EPA will not start regulating carbon dioxide emissions, these states and environmental groups

About Me

Nick Szabo

"A premier thinker about history, law and economics, and the lessons they have for security." -- Adam Shostack, Emergent Chaos

"Szabo comes out with these essays that leave me in awe." -- Brian Dunbar

"Reading material that is eclectic, challenging and endlessly fascinating." -- Sean McGrath, Propylon

"Like most blogs worth my attention, this blog is updated only infrequently. That is because the authors of blogs worth my attention only post when they have something to say that is true, relevant and not already known by their audience. Most of the human race does not have the skill to know when an idea has these three properties. The skill is particularly rare in the fields of politics and economics, which is why this blog is such a rare and valuable thing." -- Richard Hollerith

View my complete profile

are suing for a court order to force the EPA to regulate vehicle carbon dioxide emissions.

President Bush's EPA disagrees. It argues (in part by invoking non-delegation doctrine precedents) that this broad language did not grant broad powers over emissions of a ubiquitous molecule that is a necessarily substantial part of life itself. If the harm of carbon dioxide emissions is admitted, literal interpretation of the EPA's enabling statute, would, if it weren't for the above limitation to motor vehicles (and presumably similar limitations to power plants and other industrial activities for similar phrases elsewhere in the stattute) give the EPA power to regulate not only power-plant and car emissions but everything from forest and camp fires to the very air we and our animal friends breathe out of our lungs. Our bodies after all "burn" food calories and the oxygen we breathe in, producing carbon dioxide that we breathe out.

Without a non-delegation doctrine, (or alternatively without narrowly interpreting the broad language to exclude such a ubiquitous part of our bodies and the air), a vast amount of lawmaking power woould accrue to the EPA, upon recognition that carbon dioxide is causing somebody, or somebody's property, some harm, without any further initiative by the people or its representatives. Surely Congress did not intend to grant the EPA such broad powers, despite the broad language, the EPA argues (due to the industry-friendly Bush Administration, since it's opposing its own bureaucratic turf interests). The EPA is thus essentially arguing that grants of power should be interpreted narrowly: a principle of least authority should be applied. Madison would have added that even if this is what Congress had intended, Congress is not allowed to delegate such broad lawmaking powers to a non-elected body, just as it could not delegate the broad decisions on where to locate main post offices and major postal routes to the Post Office. Such a vast new area of lawmaking power must be initiated only by the people's representatives, not by unelected bureaucrats.

It's not clear whether the Supreme Court, if it decides to hear the appeal in *Massachusetts v. EPA*, will pay much attention to Madison's non-delegation doctrine. The car industry's brief (intervening on the side of Bush's EPA) dwells on a related phenomenon: given the broad grants of power in modern federal statutes, the regulatory powers of agencies often overlap, and it is this concurrent and thus conflicting lawmaking jurisdiction, rather than grant of lawmaking powers generally, that is improper. Thus, the interventors argue that regulation of carbon dioxide is better classified as regulation of fuel efficiency than as regulation of a pollutant. Thus, it is under the jurisdiction of another regulatory agency, not under the EPA.

Furthermore, the states and enviromental groups may lack standing for failing to demonstrate that global warming harms them in particular. As a scientific matter, much of the recent average global warming is highly likely to be related to rising carbon dioxide levels; a jury could find this as an unreviewable (i.e. not clearly in error) matter of fact. But contentions made about global warming as actually causing particular kinds of harm (such as the idea that it is causing more severe storms or bad crop yields in some areas) are highly speculative and probably cannot be reasonably proven in court. Thus, plaintiffs hoping to force the EPA to regulate will probably fail to demonstrate that carbon dioxide is causing them particular harm, and thus will probably fail to establish standing. Both the standing issue and the "no conflicting delegation" version of the non-delegation doctrine may thus prevent this case from reaching the traditional non-delegation doctrine issue. Nevertheless, the proposed massive expansion of the EPA into carbon dioxide regulation, without any Congressional act specifying that the EPA should regulate this ubiquitous molecule, but only harm-causing "pollutants" generally, is a very good example of the kind of thing that Madison was worried about and, for a time, successfully opposed.

Posted by Nick Szabo at 11:23 AM

2 comments:

Anonymous said...

Blog Archive

- ► 2018 (1)
- ► 2017 (3)
- ► 2016 (4)
- ► 2015 (3)
- ► 2014 (3)
- ► 2013 (3)
- ► 2012 (8)
- ► 2011 (12)
- ► 2010 (9)
- ► 2009 (29)
- ► 2008 (55)
- ► 2007 (47)
- ▼ 2006 (130)
  - ► December (4)
  - ► November (7)
  - ► October (15)
  - ► September (15)
  - ► August (20)
  - ► July (5)
  - ▼ June (10)
    - Selling seashells by the seashore
    - U.S. Supreme Court decides to hear global warming...
    - Monetary origins pushed back
    - Metabolite dismissed, but no justice argues "law o...
    - Menger on money: right and wrong
    - Security and the institutions of medieval republic...
    - Global warming, fractal delegation, and the non-de...
    - Property, security, and freedom
    - Jurisdiction as property: the paper
    - Jurisdiction as property and peer-to-peer governme...

Perhaps it just wasn't relevant to your analysis, but the non-delegation doctrine, or its precursor, goes back even further than your note indicated.

It is fairly cleark indicated by Locke in the Second Treatise, when he discusses that authority delegated by individuals to their representatievs does not constitute the authority of further delegation by those representatives.

5:36 PM

Nick Szabo said...

It's relevant, since Locke was a major influence on the Founders, but one can't mention everything in a blog post. :-) As it happens, I quote the passage to which you are probably referring (Second Treatise XI:141) on pg. 15 of my paper:

"The legislative power cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others...nor can the people be bound by any laws but such as are enacted by those whom they have chosen and authorized to make laws for them...the legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have."

12:50 PM

Post a Comment

Newer Post Home Older Post

Subscribe to: Post Comments (Atom)

- May (4)
- April (3)
- March (11)
- February (10)
- January (26)

- 2005 (44)

Simple theme. Powered by Blogger.